



THE AMERICAN LAW REGISTER AND REVIEW.

VOL. { 44 O. S. }
 { 35 N. S. }

OCTOBER, 1896.

No. 10.

REGISTRATION OF TITLE TO LAND.

In view of the interest which has been aroused in the past few years throughout the United States in the subject of the registration of title to land, and the consideration paid to the question at the World's Real Estate Congress, held during the World's Fair at Chicago, it seems not unfitting to call to the attention of the Bar some of the salient points of the system which is generally known as the Torrens System of registration.

However, the writer would hesitate, because of his superficial knowledge of the subject, to endeavor to add anything to what has been so ably said by the advocates of title registration, did he not feel that the time has come for every progressive lawyer to examine carefully the merits or disadvantages of a system which, if adopted, will effect the most radical changes in the laws governing land titles. That the Bar of this, and sister States, will shortly be compelled to consider the question, can hardly be doubted when we realize that it has already been the subject of consideration in California, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, New York, Ohio, Tennessee, and possibly other States, in many of which commissions or committees, appointed for the purpose, have

reported favorably upon the system, and recommended its adoption; in two of which, namely, Illinois¹ and Ohio,² acts have already been passed permitting the registration of title to land under a modification of the Torrens System, and in only one of which, namely, New York, has the adoption of the plan been viewed unfavorably.

The excuse, then, for this rough outline is that it may lead to a more careful consideration of a question which certainly merits the most searching and thorough study.

That the present system of investigation of the title to land is fraught with many difficulties and uncertainties, and the result of such investigation, when attained, is often far from satisfactory, are propositions that cannot seriously be controverted.

A deed of conveyance of land from A. to B., even though duly executed, acknowledged, delivered and recorded, is but evidence of the fact that A. has conveyed his interest in the land to B., and, even if we run the chain of title back to the Commonwealth, we have but a record of a series of conveyances which tend to establish the fact that B., the present holder, has a good title. This was well put by Mr. Freshfield, a leading conveyancer, before a Royal Commission in England, when he said, "title by deed cannot be demonstrable as an ascertained fact, but only presented as an inference more or less probable, and deducible from the documentary evidence accessible at the time being."

There is no certainty in the most carefully prepared brief of title, and the opinion of counsel thereon for such opinion is simply based upon the record as it exists, and contingencies will readily suggest themselves to the mind which will defeat a title, no matter how perfect the record may appear.³

The expense and delay attendant upon a thorough investigation of the record are also serious objections to our present method of conveyancing.

¹ Act of June 13, 1895.

² See Weekly Law Bulletin and Ohio Law Journal of April 27, 1896.

³ "Record Title to Land."—Harvard Law Rev., Vol. 6, p. 302.

Indeed, if any argument were needed to show the defects of our present system the rapid growth of title insurance companies in recent years, and the increase in the volume of business transacted by such companies, afford a convincing proof of its shortcomings, and clearly establish the demand on the part of purchasers of land, not only for quick transfers but also for some guarantee of the validity of the title they purchase.

The two great points of advantage claimed for the Torrens System are facility of transfer of title, and security of title when transferred.

Sir Robert Torrens, the father and author of the modern system of title registration, has stated that these were the two problems he sought to solve in the plan formulated by him.

As Commissioner of Customs in South Australia, he was impressed with the facility and security with which transfers of undivided shares in vessels were effected under a system of registration provided by certain statutes known as the Merchant Shipping Statutes. Afterwards, as Registrar of Deeds, realizing the defects and uncertainties of the then existing method of transferring title to land, he formulated a plan for the registry of land titles along the lines laid down in the Merchant Shipping Statutes, and this plan was finally adopted, and became a law in South Australia in 1857-8.

Subsequently similar laws were enacted in other countries at various times, beginning as follows: Queensland, 1861; Tasmania, 1862; Victoria and New South Wales, 1863; New Zealand, 1870; British Columbia, 1870; England, 1875; Fiji, 1876; Western Australia, 1884; Ontario, 1884; Manitoba, 1885.¹

Registration of title in some form was to be found in several European countries prior to 1857, and is found to-day in Prussia, Bavaria, Switzerland and, possibly, other European countries, but we will confine our examination to the system which was first formulated in the South Australian Act of 1857-8.

¹ Duffy & Eagleston's Transfer of Land Act of 1890, p. 3; Report of Land Transfer Commission of Illinois, p. 4.

The fundamental distinction between the law of recording as generally found throughout the United States to-day and that of registry, is that while the former simply demands the transcript of the deed of conveyance upon a public record, kept for that purpose, the latter requires not only surrender of the deed as part of the record, but also registry of title.

An illustration of the operation of the Torrens system will render our meaning clearer. A., being the owner of land, and desiring to have his title to the same registered, files his application with the registrar asking to have his land brought under the operation of the registry acts, setting forth therein the name, age and residence of the applicant, the name of his wife, if married, a description of the property and of the interest of the applicant therein, any liens and encumbrances thereon, and any estate or interest, legal or equitable, which anyone else may have in the land.¹

Upon the filing of such application the registrar makes a thorough examination of the records tending to establish the title of the applicant, and searches for liens and encumbrances against the same, exactly as though representing an intending purchaser, and at the same time causes such notice to be given to all parties interested, either by personal notification or by advertisement and publication, as may be required by the law. If, after such investigation of the record, inquiry as to the occupation of the land and investigation of any other facts brought to his attention, he is satisfied that the applicant has a good title to the land, he issues to him a certificate describing the premises, certifying that the applicant is the owner of the same, and setting forth the estate which he has therein. All estates, encumbrances, liens or charges upon or interests in the land, other than that of the registered owner, are noted in the certificate which is issued subject to them.

If the registrar is satisfied that title has not been made out, and that there are defects which cannot be remedied, he must refuse the application without prejudice.

Parties holding claims, equities, easements or other rights

¹ Duffy & Eagleston's Transfer of Land Act of 1890, p. 376; Yeakle on Torrens' System, p. 249.

not appearing upon record, may protect such rights by caveat filed with the registrar. Either party may then litigate his right and the registrar will stay all proceedings upon the application until a final decree of a court of competent jurisdiction passing upon the rights of the parties.

The certificate, when finally made out, is in duplicate, one copy being retained in the registry and forming the record, the other handed to the registered owner and constituting his evidence of title.

After the original registration all liens and encumbrances, mortgages, estates, easements and rights in the land created subsequent to such registration, must be certified to the registrar and entered by him upon the certificate, which he has retained, before the same can be effective, as against a purchaser of the registered title. To the holder of a mortgage or estate in the land or a long-term lease, a certificate is issued setting forth his interest, and note of the fact is made upon the retained certificate of the one in whom the fee is registered. No certificate is issued to the holder of a lien or encumbrance, such as a mechanic's lien or judgment, but note must be made of the same upon the registry, upon a proper certification from the clerk or other properly qualified officer of the court in which such judgment or lien is entered. Mere equitable interests cannot be entered upon the record, but the holder of any such interest can always protect himself, and prevent a sale which would destroy his interest, by filing a caveat with the registrar, which then delays all further proceeding until the same is settled by litigation by either of the parties interested.

The provision as to the entry of liens differs in different jurisdictions.

Thus the Illinois statute, above recited, provides in Section 29 as follows :

"The registered owner of any estate or interest in land brought under this act shall . . . hold the same subject only to such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except :

"(1) Any subsisting lease or agreement for a lease for a

period not exceeding five years, where there is actual occupation of the land under lease. The term lease shall include a verbal letting.

"(2) All public highways embraced in the description of the lands included in the certificate shall be deemed to be excluded from the certificate.

"(3) Any subsisting right of way or other easement, however created, upon, over, or in respect of the land.

"(4) Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.

"(5) Such right of action or counter claim as is allowed by this Act.

"(6) The right of any person in possession of, and rightfully entitled to, the land or any part thereof, or any interest therein adverse to the title of the registered owner at the time when the land is first brought under this Act, and continuing in said possession until the issuance of such last certificate of title."

The provisions of the Ohio statute are similar.

The method of transferring title after preliminary registration has been effected is one of extreme simplicity. If A. desires to purchase from B., a glance at B.'s certificate as the same appears on the registry, and a search as to liens and encumbrances, not covered by the registry, will show the exact condition of the title, and the encumbrances thereon. B. executes to A. a deed for his interest in the land, and delivers to him his certificate of title. A. takes both to the registrar, who retains the deed, cancels the old certificate, and issues a new certificate to A. If an undivided interest is conveyed, B.'s old certificate is cancelled and two new certificates issued to A. and B.

In case of the death of a registered owner the land does not pass to his heir, but to his executor or administrator, who files in the registrar's office a certified copy of his authority to act and of the will of the deceased, if any, and upon the settlement of the estate, distribution of the real estate is effected under the direction of the Court, having jurisdiction of decedent's estates; the old certificate is surrendered by the executor or administrator, and new certificates are issued as ordered by the court.

Purchasers at judicial sales, assignees, receivers and others holding similar titles can also deal with registered land under the direction of the Court having jurisdiction over them and compliance with the conditions requiring the filing of a certificate of their authority with the registrar.

This brief skeleton of the Torrens System shows that under it title to land passes to the purchaser, not because of the deed, as heretofore, but because of registration. The deed ceases to be important except as an evidence of the right of the purchaser to have the old certificate cancelled and a new one issued to him in its stead, and in some jurisdictions where the system is adopted the deed is reduced to the briefest and simplest form of transfer: (See Sec. 84 of the Ohio Statute of 1896.)

The holder of such certificate has a good title as against all the world, unless he has obtained it by fraud, or has received the same, without paying value therefor, from one who has obtained it by fraud. A *bona fide* purchaser for value without notice from one who has obtained a fraudulent registry of title is protected as against the party defrauded.

After a title has been registered no adverse title by possession can be acquired as against the registered owner, no matter how long the duration of such possession, unless, as under the Illinois statute, the adverse possession exists at the time of the original registry and continues uninterruptedly.

The benefits claimed for the system by its advocates may be summed up as, simplification and stability of title, diminution and certainty of expense incident to a transfer of land which is regulated by statutory provisions, protection to trust estates and beneficiaries, and lessening the possibility of fraud.

The chief objections urged against the plan, aside from the question of its legality, are the radical changes in the existing laws necessary to carry out the system, the cumbrous process incident to preliminary registration, the multiplication of records, the lack of necessity for any change in existing laws, the unmarketability of titles which had been refused registration, the opportunity afforded for blackmail in the free use of

caveats, and increased facility for and temptation to the commission of forgeries.

It is quite true that original registration may, in some cases, be cumbrous, but this objection would seem to be more than compensated for by the additional ease of transfer afforded thereafter.

It is also true that the volume of papers and records in the registry or recorder's office would vastly increase and the clerical force would have to be considerably enlarged.

It may be admitted that the title to land which had been refused registry would be apt to be viewed with suspicion, and would probably be less marketable, and that great freedom in the right to enter a caveat against a registered title might lead to abuses.

These objections, however, if admitted, seem to be outweighed by the advantages claimed for the system.

If the possibilities of and temptation to commit forgery are increased, the objection would, indeed, be a serious one, and it is contended by Eastwick, in a pamphlet entitled, "Registration of Land, or Registration of Title" (London, 1896), recently addressed to the Lord Chancellor, and dealing with the proposed compulsory registration law, which has been for a number of years before Parliament, that such is the case, at least, under the proposed bill.

Very slight alterations, however, could be made in the system, which would render the perpetration of a forgery more difficult under the Torrens System than under our existing laws in regard to the registration of deeds. Under our present system, if A. forges B.'s name to a deed, records the deed and subsequently destroys it, the difficulty of establishing the forgery is very great.

Under the Torrens system the original deed is retained by the registrar, and, if the registered owner were compelled to sign the certificate in the registry office, there would be an opportunity of comparing the signature of any subsequent deed with the genuine signature on the registered certificate, and the possibilities of forgery would be diminished rather than increased.

The objection, however, that the temptation to forge the signature of a registered owner is greatly increased must be admitted as sound, at least, in those jurisdictions where a *bona fide* purchaser from one who has forged can by registry of his title defeat the claim of the defrauded party.

It seems abhorrent to our sense of justice that one should be enabled, by forging the signature of a registered owner, and obtaining a registry of title in his name, to sell the land so registered to a *bona fide* purchaser for value without notice, who registers his title, and drive the true owner to seek his remedy and make good his loss by action against the registrar or against the indemnity fund.

Such, undoubtedly, is the law in many jurisdictions which have adopted the Torrens System, but others, with greater deference to accepted laws governing the rights of parties claiming under forged instruments, create an exception to the otherwise universal rule that the registered certificate is conclusive evidence of title, and compel cancellation of the certificates of the forger or his vendee, in favor of the true owner.

The objection most frequently urged against any plan of title registration is that it creates a revolution in our laws governing land titles which have been the growth of centuries of thoughtful study and careful development, and substitutes for them a scheme whereby titles are secured by the arbitrary decree of an officer not invested with judicial powers, and yet exercising such powers and delivering judgments with the force of judicial decrees.

Undoubtedly, the change is a sweeping and radical one, and yet, in this connection, it must be borne in mind that the most urgent demand of modern times, in which land is speculated and dealt in as any chattel, is that there should be some means devised by which land may be made a "quick asset," which can be sold or pledged as readily as a bond, note, or share of stock.

That this is impossible to-day must be admitted, that it is possible under a system of title registration as above explained seems fairly probable.

Then, too, it must be remembered that in no jurisdiction in

which this system has been introduced was registration under it originally compulsory, but the owner of land was perfectly free to select the new scheme or not, as he saw fit. Indeed, one of the strongest arguments advanced by the advocates of title registration to show its efficacy is that, notwithstanding the fact that registration was originally purely voluntary in the various countries adopting the plan, there has yet been in all such countries a steady increase every year in the number of titles registered. So great has been this increase, and so universal the adoption of the plan in some jurisdictions, that the laws have been so amended as to entirely supplant the old system by the new and make registration compulsory.

To the objection that the registrar is not a judicial officer, it has been answered that he can be given judicial powers similar to those granted to a register of wills, and the rights of all parties can be secured and preserved by allowing to anyone aggrieved a right of appeal to the courts.

The consideration of that portion of the Torrens System which relates to the formation of an insurance fund, and the compensation of an owner of a title or encumbrance who has, either through negligence on the part of the register, or forgery, been deprived of his title or lien, has been postponed to this point, as it can conveniently be discussed in connection with the question of the legality of title registration under our Constitution and Laws in the United States, which we will briefly consider in conclusion.

The insurance fund above referred to is formed by setting aside a portion of the fees which are charged for registration, and experience has shown that only a very small fee need be charged in order to provide an ample fund large enough to meet any possible claim in the way of indemnity from an injured party.

Thus, under the Transfer of Land Act of 1890, in Victoria, any one applying for original registration must, in addition to the registry fees, pay over to the insurance fund a sum equivalent to one half-penny in the pound, according to the value of the land at the time of registry. Afterwards, for each new registry, the purchaser must pay ten shillings into the fund.

Under the Illinois Statute the fee to be paid to the Insurance Fund is one-tenth of one per cent. of the value of the land, and this is to be paid only in three classes of cases : (1) where one applies for original registry ; (2) where a purchaser at a tax-sale of registered land asks for registry of his title ; (3) where one claiming registered land by devise or descent asks for registry of his title.

Under the system generally in vogue the registered owner, as has been said, has an absolute title, and in case of error in registration his title is still secure, and the true owner is deprived of his land and is thrown upon the fund for compensation.

We noted above, also, the fact that in some jurisdictions this rule applied even in cases of forgery, where the land had passed to a *bona fide* purchaser for value without notice of the forgery, while in others an exception to the general rule was made, and the true owner allowed to secure his title and the *bona fide* purchaser thrown upon the fund.

There are many who think that this exception should be the rule to be applied in all cases, and that the holder of a registered title should simply hold a title insured as perfect but liable to be defeated by the holder of a better title. It has been said that by adopting this plan you would be compelling the Commonwealth to go into the business of title insurance, and while it is difficult to see why the Commonwealth might not do this if it saw fit, a moment's consideration will show that the proposition is not sound. The fund is the insurer, not the state, and the fund is raised by the contributions of applicants for title registration. It is rather a plan of mutual title insurance, with the state as the trustee of the fund.

The question of whom the indemnity or insurance should be paid to, naturally leads to the question of the legality of the whole plan of title registration. The advocates of a system of title insurance, as distinguished from title registration, contend that while insurance as suggested above is perfectly legal, the plan in vogue in Australia is not feasible here because the state has no constitutional right by any process to take away the title of the true owner and decree it to be in another, even.

if the true owner is given full compensation in money for his loss. To allow this, it is urged, would be to permit the state to take private property, not for public, but for private, use.

This apparent difficulty has been carefully considered, and two different plans have been suggested to obviate it.

The first plan is adopted in the Illinois Statute, where original registration does not confer upon the holder of a certificate an absolute title as against existing titles or encumbrances, not noted in the certificate, but one which is still liable to attack by the true owner of the land or the holder of the unnoted encumbrance. At the same time the Statute of Limitations is cut down to five years, so that after the expiration of that time the title is perfected in the registered owner. To thus shorten the period within which a title may be asserted adverse to that of the registered owner is clearly within the province of the legislature, and the plan seems to meet the constitutional objection and at the same time attain the result of ultimately vesting in the registered owner an unassailable title.

The other method is suggested in the reports of the California commissioners, and is dwelt upon at considerable length by Mr. Chaplin, one of the Massachusetts commission, in his minority report.

Briefly, the plan is to so effect original registration that the decree of registry shall be binding upon the whole world.

Mr. Chaplin contends that it is a familiar principle of our law that decrees, in many instances, are conclusive as against parties and privies, and also all possible unknown claimants. He cites the familiar examples of a final adjudication in partition, the probate of wills, decrees of distribution, allowance of accounts, etc., which, under various laws of Massachusetts, are all conclusive in favor of innocent purchasers for value after a brief period. In the same way many states provide by statute a process by which the holder of the record title to land, which is clouded by an adverse claim or the possibility of an adverse claim, may petition the court having jurisdiction over questions involving the title to real estate, setting forth his title, naming, *so far as he can*, the adverse claim and the

adverse claimants and praying the court that such claimants be summoned to show cause why they should not appear and try such claim; and the court, after giving such notice by publication or otherwise, as it sees fit, can enter a decree binding and conclusive, not only on the parties actually served, but upon the whole world.

The constitutionality of such legislation and its binding force upon everyone, even though not served, has been upheld by the courts.

Mr. Chaplin, therefore, argues that, in analogy to this process, for quieting title, a petition for original registration could be presented either to a magistrate, specially to be appointed for the purpose, or to the court, if this be considered necessary, and the decree of that magistrate or court, after notice given as above, would be binding upon the whole world.¹

While this plan might be effective to settle the title of the original registered owner, it would still seem that cases might arise where we could not follow the Australian system exactly, because of constitutional limitations.

Take the illustration of forgery which we have already used. If A. has a registered title and B., by forgery, succeeds in having a certificate issued to him, and in turn sells to C., who registers his title, a law directing a decree of court that C.'s title is superior to A.'s, would probably be unconstitutional, as it would deprive A. of his title without fault on his part, without proceedings against him, notice and an opportunity to be heard.

To this extent, then, we should deviate from the Australian system and provide that, in such case, A. could not be deprived of his rights.

To sum up, if original registry is only allowed by a court of competent jurisdiction after petition and notice, it can legally be held effective as against everyone. Subsequent registration can be held equally effective except in cases of forgery or, probably, for a similar reason, mistake.

If the system of title registration were adjudged sound in

¹ See Report of Mass. Land Transfer Commission to the Legislature of Mass. for 1894, p. 119-121.

theory, the practical question of its application does not seem to present any serious difficulties. The law could be so framed that the offices of recorder of deeds and registrar of titles could be united in one man, who should be a member of the Bar of a certain number of years' standing. He should be allowed necessary counsel, who should be regularly salaried officers, to advise him upon the validity of titles sought to be registered. Additional clerks and assistants and new record books would be required, but such matters of detail could be easily arranged, and there seems to be no good reason why the two systems, the old and the new, could not be carried on through the same office.

In conclusion, the writer can only reaffirm his consciousness of the fact that his knowledge of the subject of title registration is at best but limited, and that in this brief sketch he has probably failed to consider many of the arguments which can be urged both for and against the system.

If, however, he can succeed in arousing in the profession an interest which will lead to a careful consideration and study of this important question, he is willing to be called to account for his blunders.

Charles C. Townsend.

Philadelphia, September, 1896.